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December 15, 2000

By UPS overnight mail (Monday delivery)

Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*

Dear Mr. Secretary or Representative:

Enclosed please find an original and 25 copies of Reply To Comments on Notice of Proposed Rulemaking, Served October 3, 2000, for filing with the Board in the above referenced matter.

Twenty-five copies accompany the original. Also enclosed is a 3.5-inch IBM-compatible floppy diskette providing an electronic copy of these Reply Comments in Word Perfect format.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland, Jr.
Attorney for IMC Global Inc.

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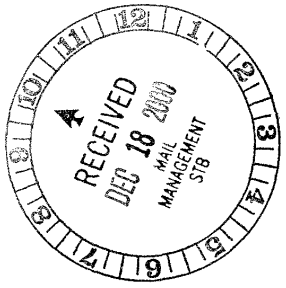
BEFORE THE
SURFACE TRANSPORTATION BOARD



MAJOR RAIL CONSOLIDATION PROCEDURES	)	EX PARTE NO. 582 (SUB-NO. 1)

REPLY TO COMMENTS ON NOTICE OF PROPOSED RULEMAKING, SERVED OCTOBER 3, 2000

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DUE DATE: December 18, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION PROCEDURES	)	EX PARTE NO. 582 (SUB-NO. 1)

REPLY TO COMMENTS ON NOTICE OF PROPOSED RULEMAKING, SERVED OCTOBER 3, 2000

Pursuant to the procedural schedule contained in the Notice of Proposed Rulemaking (NPR) in this proceeding, served October 3, 2000, IMC GLOBAL INC. (IMC) hereby files this Reply in opposition to certain contentions made in the Comments submitted in behalf of The Association of American Railroad (AAR) and CSX Corporation-CSX Transportation, Inc. (CSX) on November 17, 2000.[1/]

OVERVIEW

IMC believes that the most appropriate and beneficial aspect of the NPR is the shift in rail merger policy from attempting to preserve rail competition to requiring provisions for enhanced competition. The factual support for that policy shift, as articulated in the NPR and in numerous Comments filed in response to the NPR, is beyond legitimate challenge, in IMC's view. Certainly, none of the Comments filed in behalf of major rail carriers provides effective rebuttal of that support.

The Comments submitted in behalf of Class I rail carriers by AAR and by CSX challenge the legal basis for that policy shift, contending that the Board does not have statutory authority to

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1/ IMC submitted Comments in response to both the Advance Notice of Proposed Rulemaking (ANPR) and the NPR in this proceeding. IMC's identity and interest were explained in its Comments in response to the ANPR, filed May 16, 2000, at 1-2.

impose conditions to authorization of rail mergers that would enhance competition, in contrast to merely preserving competition that would be directly affected by the merger. IMC's Reply demonstrates that such legal argument is without merit.

REPLY

At page 17 of its comments, AAR contends that -

> The Board and the ICC have repeatedly found that their conditioning authority does not and should not go beyond the correction of competitive harms created by the merger.

Contrary to AAR's contention, the Board and the ICC have never found that their statutory conditioning authority is so limited.[2/] The ICC has adopted criteria for imposing conditions to remedy anticompetitive effects of mergers that include such a limitation, but the agency has been careful to state that such criteria are "uncodified". *See Rio Grande Ind., Inc. - Pur. & Track - Soo Line R. Co.*, 6 I.C.C.2d 854, 875 (1990); and *Rio Grande Industries, et al. - Control - SPT Co., et al.*, 4 I.C.C.2d 834, 855 (1988). Thus, it may be correct to say that in the past the agency has found that as a matter of policy in light of then-existing conditions, its conditioning authority should be so limited. However, it is not accurate to contend that the agency has ever stated that as a matter of law its statutory authority to impose conditions is so limited.

[2/] Neither has any Court. The Court in *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), stated that the ICC's policy of refusing to impose conditions not designed to mitigate anticompetitive consequences stemming directly from a merger "reasonably effectuates the (ICC's) statutory mandate" (at 722). However, the Court did not attempt to determine whether the statute is broad enough to authorize the imposition of conditions that would enhance competition, nor whether a policy of enhancing competition would also reasonably effectuate the mandate of 49 U.S.C. § 11324(c).

On the contrary, the Board itself departed from that criterion in imposing a condition to authorization of acquisition of Conrail that clearly went beyond the correction of competitive harm created by that acquisition, i.e., a condition for trackage rights for Canadian Pacific between Albany and New York City, NY, "to restore a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail". *CSX Corp., et al. - Control - Conrail, Inc., et al.*, ___ STB ___, STB Finance Docket No. 33388, Decision No. 89, served July 23, 1998 at 81; *see, also, id.* at 70, note 110. The two major Class I carriers who were applicants for acquisition of Conrail in that case, both of whom are members of AAR, did not seek judicial review of imposition of that condition on the ground that the Board lacked statutory authority to take such action. As appears below, the Board's action there was clearly in accordance with the statute.

CSXT's comments at page 44 attempt to create the false impression that the merger statute itself limits the Board's conditioning authority to conditions that alleviate anticompetitive effects of a merger. Thus, CSXT there states that -

> Congress gave the Board the power to condition mergers that it approves 'to alleviate anticompetitive effects of the transaction . . .' 49 U.S.C. § 11324(c)
> . . .

That out-of-context statement materially distorts the provisions of the statute on authority to impose conditions. After providing that the Board is to authorize transactions found to be consistent with the public interest, 49 U.S.C. § 11324(c) grants the Board authority to "impose conditions governing the transaction." The statute specifies that the grant of such conditioning authority includes conditions for "the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities." The statute does <u>not</u> specify that the conditioning

authority is limited to conditions to alleviate anticompetitive effects of transactions. The statute provides that any trackage rights and related conditions that may be imposed to alleviate anticompetitive effects of a transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated. The latter provision is a limitation on specified types of conditions that are imposed to alleviate anticompetitive effects of transactions. It does not purport to be a limitation on the nature or purpose of conditions that can lawfully be imposed under 49 U.S.C. § 11324(c).

The fashioning of merger conditions is a matter entrusted by statute to the agency's expert judgment. *Seaboard Coast Line R. Co. v. United States*, 599 F.2d 650, 652 (5th Cir. 1979). The statute provides the agency with "extraordinarily broad discretion" in imposing conditions in merger cases. *Southern Pacific Transp. Co. v. ICC*, *supra*, 736 F.2d at 721 (D.C. Cir. 1984). The only limitations on conditions imposed by the agency in merger cases is that consideration of such a condition be appropriate to the public interest determination to be made by the agency and that the condition not be arbitrarily imposed. *New York Central S. Corp. v. United States*, 287 U.S. 12, 28 (1932).

It is evident from the foregoing that the Board has authority under 49 U.S.C. § 11324(c) to impose a condition to authorization of a merger that would enhance rail competition rather than merely preserving competition that would be directly affected by the merger, as long as (1) imposition of the condition is appropriate to the public interest determination being made by the Board; and (2) the condition is not arbitrarily imposed.

WHEREFORE, the Board should find that in appropriate circumstances it has statutory authority to impose conditions to authorization of rail mergers that would enhance rail competition, rather than simply preserving competition that would be lost as a direct result of such mergers.

Respectfully submitted,

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DUE DATE: December 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2000, I served the foregoing document, Reply Comments on Notice of Proposed Rulemaking, Served October 3, 2000 , by first-class, U.S. mail, postage prepaid, on all parties of record listed on the Board's official service list.

Thomas F. McFarland Jr.

Thomas F. McFarland, Jr.